Filed 9/29/14 P. v. Bowman CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WENDY BOWMAN,

Defendant and Appellant.

G048873

(Super. Ct. No. 11NF0920)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Julie L. Garland, Assistant Attorneys General, Heather F. Crawford, Marvin E. Mizell and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Wendy Bowman of receiving stolen property (count 1, Pen. Code, § 496, subd. (a); all further statutory references are to this code), Bowman pleaded guilty to misdemeanor possession of a hypodermic needle and syringe (count 2), and Bowman admitted to sentencing enhancement allegations that she had served three prior prison terms. In a bifurcated trial, the trial court found additional sentencing enhancement allegations true, including that Bowman committed a prior strike offense and that she committed the offense charged in count 1 while out on bail. After striking the prior strike and one of the prior prison term enhancements, the trial court sentenced Bowman to an aggregate six-year prison term. She contends the judgment must be reversed because the trial court failed to instruct the jury sua sponte on the crime of theft.

Bowman recognizes she was not charged with theft, but argues the theft instruction was necessary so the jury could determine whether the victim abandoned the personal checks later found in Bowman's possession. Bowman argues the jury reasonably could have concluded the checks had not been stolen because they were abandoned, and therefore she did not possess or receive stolen property.

The victim, however, testified she gave the checks to her boyfriend to destroy, and the fact the boyfriend left them inside a private residence his father shared with Bowman furnishes no basis to conclude the victim or her boyfriend intended to abandon the checks. Accordingly, no theft instruction was required because there was no evidence the checks had been abandoned. In any event, the jury heard and rejected Bowman's claim that the victim abandoned her ownership interest by discarding the checks, and therefore Bowman was not guilty of receiving stolen property because the checks no longer belonged to the victim. Because the jury considered Bowman's

argument despite omission of the theft instruction she claims was essential, Bowman suffered no prejudice. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Near midnight on a March evening in 2011, a La Habra Police Department traffic officer stopped Bowman for running a red light. When Bowman appeared extremely nervous during the stop, another officer asked for and received consent to search her purse and found two checks in the name of "Mildred L. Ford."

Mildred Ford, who was wheelchair bound, testified she wrote the first check in March 2000 to pay for gasoline, and she later wrote the second check on the same credit union checking account. Ford's boyfriend, Daniel Patterson, explained that about a year before the trial, he and Ford found many of her old checks and checkbooks in a cabinet below her oven. They tore up some of the checks and together placed the remainder in a black plastic bag. Ford testified she gave the checks in the bag to Patterson and instructed him to destroy them. Patterson told her he would shred the checks later, and confirmed Ford directed him to destroy them. Patterson took the checks to his father's house, where Bowman, an acquaintance of Patterson's father, happened to reside at that time.

Patterson placed the bag containing the checks in a room where he kept all his belongings, intending to destroy the checks as Ford requested. He never gave Bowman permission to possess Ford's checks and did not know how Bowman came to possess Ford's two checks.

At trial, the prosecutor explained she did not charge Bowman with stealing the checks because she could not prove beyond a reasonable doubt that Bowman was the

person who removed Ford's two checks from Patterson's bag. But even if Bowman was not the initial thief, the prosecutor argued Bowman knew the checks were stolen when she placed them in her purse because the personal information on the checks clearly showed they belonged to someone else, and neither Ford nor Patterson gave Bowman permission to possess the checks. The jury convicted Bowman as noted, and she now appeals.

II

DISCUSSION

Bowman argues the trial court erred in failing to instruct the jury on the elements of theft even though the prosecutor did not charge her with that offense. The theft instruction (CALCRIM No. 1800) would have specified that larceny requires the defendant to take possession of property "owned by someone else." Bowman argues this language was necessary so the jury would understand she could not be convicted of receiving stolen property if the jury concluded no one owned the checks because Ford abandoned the checks when she turned them over to Patterson. Bowman's instructional challenge has no merit for three reasons.

First, there was no evidence requiring the trial court sua sponte to instruct the jury with the "owned by someone else" language in CALCRIM No. 1800. To the contrary, the evidence did not suggest abandonment was a pertinent factual issue, given Ford and Patterson's uniform testimony Ford intended to shred the items so no one else could have them. Ford placed the checks in a trash bag as a means of conveyance for Patterson to transport them and destroy them, not to abandon them. The evidence disclosed no intent to abandon the property without concern for its disposition, but rather the opposite.

Second, the cases on which Bowman relies are inapt. These decisions concluded the defendant could not be liable for theft or conversion because the alleged victim placed personal property in an outdoor dumpster or trash receptacle. (*Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1282 [“‘“A thing is abandoned when the owner throws it away, or leaves it without custody, because he no longer wishes to account it as his property”’”]; *Long v. Dilling Mechanical Contractors, Inc.* (Ind. Ct.App. 1999) 705 N.E.2d 1022, 1025 [“personalty discarded as waste is considered abandoned”].) But here neither Ford nor Patterson placed her checks in a trash can accessible to the public. Rather, each explained Ford intended to destroy the checks so they would not fall into anyone else’s possession.

Finally, the jury considered and rejected Bowman’s argument. Bowman argued that the checks did not constitute stolen property because Ford effectively abandoned the checks when she placed them in a trash bag and instructed Patterson to destroy them. But the jury rejected Bowman’s argument and concluded the checks belonged to Ford when they were stolen. We do not think omission of CALCRIM No. 1800’s “owned by someone else” language affected Bowman’s defense theory because the question of whether the checks belonged to someone besides Bowman was implicit in the jury’s stolen property determination. The trial court properly instructed the jury on the elements of receiving stolen property (CALCRIM No. 1750), including the explanation that “property is stolen if it was obtained by any type of theft.” Bowman relied on this language to argue Ford discarded the checks and therefore Bowman placed in her purse abandoned, not stolen, property, but the jury disagreed. Because the jury considered and rejected Bowman’s claim, she suffered no possible prejudice even assuming arguendo any error in omitting the theft instruction.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.